RHB Bank Bhd v Pharmmalaysia Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5-24-274 OF 1997
HAIDAR J
18 DECEMBER 1997

Civil Procedure *— Locus standi — Shareholder of bank instituting proceedings against defendant to ensure compliance with memorandum and articles of association — Share certificate not under plaintiff's name but under its nominee — Whether plaintiff can institute proceedings*

Companies and Corporations *— Shares — Sale of shares — Sale by way of tender — Defendant failed, refused and/or neglected to split share certificate — Tenderer has been denied full ownership of share certificate — Plaintiff obtained court's order against defendant — Whether plaintiff entitled to do so*

One Dinesh Kumar, who owned 10,740,000 shares in the defendant, pledged the shares to the plaintiff as security for a loan facility. Upon default in repayment of the loan, a judgment in default was obtained against him. Subsequently, the plaintiff offered part of the shares for sale by way of tender to existing shareholders and directors of the defendant. One Isaac Alexander Lamach ('the tenderer') purchased 3,800,000 ordinary shares in the defendant. In accordance with the terms of the tender, 480,000 shares held under Share Certificate No 272 were delivered upon payment of the balance purchase price for the 3,800,000 shares. The remaining 3,320,000 shares presently held as part of Share Certificate No 270 were to be delivered upon completion of the splitting of Share Certificate No 270 which presently represented 6,753,500 ordinary shares of the defendant. The tenderer had paid the full price of the shares but the defendant had failed, refused and/or neglected to take the necessary steps to split Share Certificate No 270 and duly deliver the same to the plaintiff, therefore, the tenderer had been denied his entitlement to the full ownership of the relevant share certificate. It was the duty of the plaintiff to provide the full ownership of the relevant share certificate to the tenderer but it cannot do so without the defendant taking action to split Share Certificate No 270. This led the plaintiff to come to this court for a declaration that the defendant do effect the splitting of the shares.

The defendant's objections against the prayers of the plaintiff were divided into two issues, namely the preliminary issue and the substantive issue. In the preliminary issue, the defendant questioned the locus standi of the plaintiff in instituting the action against it. The defendant contended that the shares were registered under the name of D & C Nominees (Tempatan Sdn Bhd) ('the nominee company'), not the plaintiff and that there was no privity of contract between them. The substantive issue was whether the plaintiff was entitled to split Share Certificate No 270.

Held, allowing the plaintiff's application:

(1) The nominee company was the nominee of the plaintiff. By way of cl 6 of the memorandum of deposit of shares, it was agreed that the plaintiff was entitled to register the shares under its name or in the name of the bank's nominee, ie the nominee company. The plaintiff was the necessary party in this action as it had a duty under the terms of the tender to issue the shares to the tenderer. Therefore, the nominee company, as a nominee of the plaintiff, should be made the co-plaintiff (second defendant) in this action. Bearing in mind the relationship of the plaintiff and the nominee company vis-a-vis the defendant, the court exercised its discretion by giving leave for the nominee company to be added as a second defendant. With the addition of the nominee company as a party, privity of contract between the plaintiff and the defendant was no longer an issue (see p 759D–E, 706A–C).

(2) The plaintiff was entitled to come to the court for a declaration that the defendant do effect the splitting of the shares within a reasonable time. This was because the defendant had been sitting on the issuance of splitting of Share Certificate No 270, leaving no choice to the plaintiff but to come to court for an order (see pp 760I–761A); *Hickman v Kent or Romney Marsh Sheepbreeders' Association* (1920) 37 TLR 163 followed.

[Bahasa Malaysia summary

Seorang bernama Dinesh Kumar, yang memiliki 10,740,000 saham defendan, menyandarkan saham-saham kepada plaintif sebagai cagaran untuk kemudahan pinjaman. Atas keingkaran bayaran balik pinjaman tersebut, penghakiman ingkar telah diperolehi terhadapnya. Berikutnya, plaintif menawarkan sebahagian daripada saham tersebut untuk dijual melalui tender kepada pemegang saham dan pengarah defendan. Seorang bernama Isaac Alexander Lamach ('pihak yang memberi tender') telah membeli 3,800,000 saham biasa defendan. Menurut terma tender tersebut, 480,000 saham yang dipegang di bawah Sijil Saham No 272 telah dihantar atas bayaran baki harga belian untuk 3,800,000 saham itu. Baki saham 3,320,000 yang masih dipegang sebagai sebahagian Sijil Saham No 270 hendaklah dihantar-serah atas penyempurnaan pembahagian Sijil Saham No 270 yang kini mewakili 6,753,500 saham biasa defendan. Pihak yang memberi tender telah membayar harga penuh saham-saham tetapi defendan gagal, enggan dan/atau tidak mengambil langkah-langkah yang perlu untuk membahagikan Sijil Saham No 270 dan menghantar-serah yang sama kepada plaintif, maka pihak yang membuat tender telah dinafikan haknya untuk mendapat milikan penuh sijil-sijil saham yang relevan. Ia merupakan kewajipan plaintif untuk memberikan milikan penuh sijil saham yang relevan kepada pihak yang membuat tender tetapi ia tidak boleh berbuat demikian tanpa tindakan defendan untuk

membahagikan Sijil Saham No 270. Ini membawa kepada plaintif meminta mahkamah untuk satu deklarasi bahawa defendan menyempurnakan pembahagian saham-saham tersebut.

Bantahan-bantahan defendan terhadap permohonan plaintif dibahagikan kepada dua isu, iaitu isu permulaan dan isu substantif. Dalam isu permulaan, defendan mempersoalkan locus standi plaintif dalam memulakan tindakan terhadapnya. Defendan berhujah bahawa saham tersebut didaftarkan di bawah nama D & C Nominees (Tempatan Sdn Bhd) ('syarikat penerima namaan'), bukan plaintif dan tidak terdapat priviti kontrak di antara mereka. Isu substantif adalah sama ada plaintif berhak membahagikan Sijil Saham No 270.

Diputuskan, membenarkan permohonan plaintif:

(1) Syarikat penerima namaan adalah penerima namaan plaintif. Menerusi fasal 6 memorandum deposit saham-saham, ia dipersetujui bahawa plaintif berhak mendaftarkan saham-saham di bawah namanya atau dalam nama penerima namaan bank, iaitu syarikat penerima namaan. Plaintif adalah pihak yang perlu dalam tindakan ini kerana ia wajib di bawah terma tender tersebut untuk mengeluarkan saham-saham kepada pihak yang memberi tender. Maka, syarikat penerima namaan tersebut, sebagai penerima namaan plaintif, haruslah dijadikan plaintif bersama (defendan kedua) dalam tindakan ini. Dengan mengingati hubungan plaintif dan syarikat penerima namaan berkaitan dengan defendan, mahkamah melaksanakan budi bicaranya dengan memberi kebenaran untuk syarikat penerima namaan ditambah sebagai defendan kedua. Dengan tambahan syarikat penerima namaan sebagai suatu pihak, priviti kontrak di antara plaintif dan defendan tidak lagi menjadi isu (lihat ms 759D–E, 706A–C).

(2) Plaintif berhak menghadapi mahkamah untuk satu deklarasi bahawa defendan melaksanakan pembahagian saham-saham dalam masa yang munasabah. Ini adalah kerana defendan telah melengah-lengahkan pembahagian Sijil Saham No 270, dan tidak memberi pilihan kepada plaintif kecuali menghadapi mahkamah untuk satu perintah (lihat ms 760H–761A); *Hickman v Kent or Romney Marsh Sheepbreeders' Association* (1920) 37 TLR 163 diikut.]

Notes

For a case on locus standi of shareholders of bank to institute proceedings against defendant to ensure compliance with memorandum and articles of association, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 3109.

For cases on sale of shares, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 349–352.

Cases referred to

Burdett v Standard Exploration Co Ltd (1899) 16 TLR 112 (refd)
Hickman v Kent or Romney Marsh Sheepbreeders' Association (1920) 37 TLR 163 (follld)
Malite Sdn Bhd v Abdul Karim bin Gendut & Ors [1981] 2 MLJ 29 (refd)

Legislation referred to

Rules of the High Court 1980 O 15 rr 6(2)(ii), (3)

DP Naban (*Raja Eileen Soraya* with him) (*Lee Hishamuddin*) for the plaintiff.

VM Mohan (*Fareed bin Abdul Gafoor* with him) (*VM Mohan Fareed & Co*) for the defendant.

Haidar J: The defendant appealed against the order made by me, granting the prayers of the plaintiff in this originating summons, except in respect of costs for which no order was made.

The prayers except costs are:

(1) the defendant do within ten (10) days after service of this order on it, caused to be issued and/or issue new share certificates split in the denominations of 3,320,000 and 3,433,500 shares in respect of the 6,753,500 shares in the name of D & C Nominees (Tempatan) Sdn Bhd, the nominees of the plaintiff held under Share Certificate No 270 and deliver the same to the plaintiff including, but not limited to the following:

   (a) resolving at the defendent's board of directors' meeting for the splitting of Share Certificate No 270 into denominations of 3,320,000 and 3,433,500 shares and issuance of new share certificate.

   (b) at least one of the directors of the defendant signing the new share certificates; and

   (c) instructing the registrar to carry out the necessary administrative actions for the splitting of the said Share Certificate No 270 and issuance of the new share certificates;

(2) that the defendant shall do all acts necessary to carry out the splitting of the said 6,753,500 shares into such denominations as stated in para (1) and deliver the duly split share certificates to the plaintiff;

(3) in the event that the defendant fails to comply with para (1), the senior assistant registrar shall issue new share certificates in respect of the said 6,753,500 shares, currently held under Share Certificate No 270 in denominations of 3,320,000 and 3,433,500 ordinary shares;

(4) ...; and

(5) such further or other orders which may be made in the premises as this honourable court shall deem fit.

A The originating summons is supported by the affidavit of Tan Lee Peng, the manager of the plaintiff and the further affidavits of Raja Eileen Soraya Raja Aman, the solicitor of the plaintiff (encll 9 and 11).

The defendant opposed the originating summons through the affidavits of Upendra Patel a/l Chimanbhai Patel, a director of the defendant (encls 6, B 8 and 10).

Facts

One Dinesh Kumar a/l Jashbhai Nagjibhai Patel ('Dinesh Kumar') beneficially owned 10,740,000 shares in the defendant. Dinesh Kumar C pledged the said 10,740,000 shares to the plaintiff (then known as DCB Bank Bhd) vide a memorandum of deposit dated 10 March 1997 (exh A–1, pp 9–19) as security for a loan facility extended by the plaintiff to him. It was an expressed term of the said memorandum of deposit that in the event of default in payment of all sums or sums as were therein secured, it shall be lawful for the plaintiff at any time without any notice or further D consent, to sell the said securities in such manner and upon such terms as the plaintiff shall think fit.

It seemed that Dinesh Kumar defaulted in the repayment of the said loan and the plaintiff commenced an action vide Kuala Lumpur High Court Civil Suit No D2–22–1082–1993 for the recovery of the same. Judgment in default E was obtained against Dinesh Kumar on 30 September 1993 ('the judgment') (exh A–1, at p 20).

Pursuant to the said judgment and in accordance with the terms of the memorandum of deposit, the plaintiff instructed Messrs Coopers & Lybrand to offer part of the said securities for sale by way of tender to the existing shareholders and directors of the defendant.

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A total of 4,497,500 ordinary shares in the defendant were offered for tender in the following manner:

> Share Certificate No 272 — 480,000 ordinary shares.
>
> Part of Share Certificate No 270 (subject to splitting) — 4,017,500 ordinary shares.

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At the end of the tender exercise, one Isaac Alexander Lamach was chosen as the successful bidder for those shares ('the tenderer'). The tenderer is a director of the defendant. It was agreed that 3,800,000 ordinary shares in the defendant would be purchased by the tenderer at the price of RM2.15 H per share (see the tender document dated 12 November 1996 (exh A–2), the tenderer's letter dated 20 November 1996 (exh A–3), and the plaintiff's letter dated 22 November 1996 (exh A–4)).

In accordance with the terms of the tender, 480,000 shares held under Share Certificate No 272 were delivered upon payment of the balance purchase price for the said 3,800,000 shares. The remaining 3,320,000 shares I presently held as part of Share Certificate No 270 were to be delivered upon completion of the splitting of Share Certificate No 270 which presently represents 6,753,500 ordinary shares of the defendant (see exh A–5).

By letters dated 1 April 1997 and 16 May 1997 to Securities Services (Holdings) Sdn Bhd, the company secretary of the defendant, the plaintiff through its solicitors requested that the Share Certificate No 270 be split into two share certificates in the denominations of 3,320,000 and 3,433,500 shares and that the same be delivered to the plaintiff's solicitors (see exh A–6). A

The memorandum and articles of association of the defendant states clearly the entitlement of its members to have new share certificates upon the transfer of part only, of shares comprised in a certificate. The articles further provide that, at least the signature of one director of the defendant is required to enable the issuance of new share certificates (see exh A–7). B

To date, the only reply received from Securities Services (Holdings) Sdn Bhd vide letter dated 26 May 1997 is that they have not been able to obtain approval from the board of directors of the defendant (see exh A–8). C

The tenderer has now paid the full amount of the price of the shares sold pursuant to the tender. However, as the defendant has, to date, failed, refused and/or neglected to take the necessary steps to split Share Certificate No 270 and duly deliver the same to the plaintiff, the said tenderer has been denied his entitlement to the full ownership of the relevant share certificates. D

Securities Services (Holdings) Sdn Bhd has, through its solicitors Messrs Shearn Delamore & Co, given assurance that it will take all the steps necessary to ensure the issuance of the new share certificates. On this assurance, the plaintiff's solicitors wrote to Messrs Shearn Delamore & Co confirming its assurance and will withdraw the action No D–24–165–1997 with no order as to costs and with liberty to file afresh (see exh A–9). E

The issue is centred substantially on the defendant's failure, refusal and/or neglect to take the necessary steps to split Share Certificate No 270 and deliver the same to the plaintiff so that the tenderer should be entitled to the full ownership of the relevant share certificates. This is because, under the terms of the tender, it is the plaintiffs' duty to provide the full ownership of the relevant share certificate to the said tenderer. In order to do so, the defendant will have to take action to split Share Certificate No 270. F G

Preliminary issue

Before considering the substantive issue, the defendant by way of the affidavit of Upendra Patel a/l Chimanbhai Patel, a director of the defendant (encl 10) at para 5 thereof, questioned the locus standi of the plaintiff in instituting this action against the defendant on the ground that the shares were registered under the name of D & C Nominees (Tempatan) Sdn Bhd and not the plaintiff. Further, it is claimed that there is no privity of contract between the plaintiff and the defendant. H

The defendant, through its solicitors, M/s VM Mohan, Fareed & Co, also gave notice vide letter dated 14 November 1997 (exh R–3, p 1) to the plaintiff's solicitors, M/s Lee Hishamuddin, of its intention to raise a preliminary objection on the locus standi of the plaintiff in filing this action. I

A The plaintiff, through the affidavit of its solicitors, Raja Eileen Soraya Raja Aman (encl 11) exhibited a letter from RHB Capital Nominees (Tempatan) Sdn Bhd (formerly known as Nominees (Tempatan) Sdn Bhd) dated 18 November 1997 (exh R–3, p 2) wherein they stated that they are the nominees of the plaintiff and if need be, gave the authority to the plaintiff's solicitors to act on their behalf in this action. Though this affidavit B was filed late, counsel for the defendant has no objection to it.

It is not disputed that the Share Certificate No 270 of the defendant is registered under the name of D & C Nominees (Tempatan) Sdn Bhd (formerly known as D & C Nominees Sdn Bhd) ('nominee company') (see exh 'A–5').

C Equally, it would appear that the defendant did not dispute paras 1, 2 and 3 of the affidavit of Tan Lee Ping, the manager of the plaintiff (encl 1) as well as exh A–1, that is, the memorandum of deposit executed between Dinesh Kumar and the plaintiff.

The defendant may have a point that the proper party in this action D should be the nominee company if one looks at the nature of the application and the prayers. However, it should be noted that the nominee company is the nominee of the plaintiff (see exh R–3, p 2). This is not disputed by the defendant. In any event, by way of cl 6 of the memorandum of deposit of shares, it is agreed that the plaintiff is entitled to register the shares under its name or in the name of the bank's nominee, that is, the nominee E company. The plaintiff is a necessary party in this action as it has a duty under the terms of the tender to issue the shares to the tenderer. In my view, the nominee company as a nominee of the plaintiff should necessarily be a party, that is, as a co-plaintiff in this action. This is simply because the Share Certificate No 270 is registered under its name. The nominee company is F therefore a member of the defendant. Hence, the need for the nominee company to be made a party to this action.

The preliminary issue raised by the defendant, in my view, is purely technical in nature.

As a result, counsel for the plaintiff sought the leave of the court under G O 15 r 6(2) of the Rules of the High Court 1980 to add the nominee company as a co-plaintiff, that is, as a second plaintiff. By way of authority for him to apply, he relied on the letter from the nominee company (see exh R–1 at p 2 of encl 11). However, counsel for the defendant contended that such authority should be given to the plaintiff and not the plaintiff's solicitors. In my view, clearly, there is no merit at all in such a contention. H The step taken by the nominee company is the correct one, that is, authorizing the solicitors for the plaintiff to act for it as it is clear from the wordings in the last part of O 15 r 6(2)(ii) which reads:

> ... but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

I Should the court then entertain the oral application of the plaintiff's solicitors under O 15 r 6(2)? Under O 15 r 6(3), an application under para 2 of O 15 r 6 must necessarily be supported by an affidavit showing his

interest in the matters in dispute in the cause or matter, or as the case may be, the question or issue to be determined as between him and the party, except with leave of the court. The question is, should the court exercise its discretion and grant leave in this action? As I said earlier, the issue raised by the defendant is purely a technical one and bearing in mind the relationship of the plaintiff and the nominee company, vis-a-vis the defendant, I should in the circumstances exercise my discretion by giving leave for the nominee company to be added as a second plaintiff and I so ordered accordingly (see Federal Court case of *Malite Sdn Bhd v Abdul Karim bin Gendut & Ors* [1981] 2 MLJ 29). The granting of the leave, in my view, did not in any way prejudice the defendant, given the clear facts of this case, where the Share Certificate No 270 is registered under the nominee company. This is not disputed by the defendant. With the addition of the nominee company as a party, the issue of privity of contract between the plaintiff and the defendant, raised by the defendant, is no longer relevant.

However, counsel for the defendant applied for an adjournment after my order, granting leave for the nominee company to be made as a second plaintiff in order to get instructions whether to appeal against the order made by me. As rightly submitted by counsel for the plaintiffs, this preliminary issue can be taken together with the substantive issue on appeal in the event the court ruled against the defendant on the substantive issue. In that event, I ordered this action be proceeded with and declined the application of counsel for the defendant for an adjournment. Costs of the preliminary issue were reserved by me, though counsel for the plaintiffs submitted that it should follow the event.

Substantive issue

The substantive issue, as I said earlier, is whether the plaintiffs (at least the second plaintiff (nominee company)) is entitled to split the Share Certificate No 270.

According to *Halsbury's Laws of England* (4th Ed) at para 459 of p 309, in dealing with split certificates states that whether a shareholder has the right to divide his shareholding and accordingly force the company to give him two or more certificates in respect of it depends entirely on the construction of the articles of the company.

In this case, art 17 of the defendant provides that a person who is registered as a member of the defendant (which is the case in respect of the nominee company), is entitled to split the share except that if a member requires more than ten share certificates, he shall pay a sum not exceeding RM3 per certificate for every additional certificate or such other sum per certificate for every additional certificate as may from time to time be permitted by the Kuala Lumpur Stock Exchange plus the stamp duty payable under any law for the time being in force.

In my view, the plaintiffs are entitled to come to court for a declaration that the defendant do effect the splitting of the shares within a reasonable time (see *Burdett v Standard Exploration Co Ltd* (1899) 16 TLR 112). This is because, the defendant has been sitting on the issuance of splitting of

A Share Certificate No 270 leaving no choice to the plaintiffs but to come to the court for an order.

It would be wrong for the defendant to bring in the issue of a third party in resisting the action of the plaintiffs, as it is clear the contract is between the defendant and the member, ie the nominee company. As was said in the B case of *Hickman v Kent or Romney Marsh Sheepbreeders' Association* (1920) 37 TLR 163 at p 900:

> ... first, that no such article constitute a contract between the company and a third person; secondly, that no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as a solicitor, promoter, director, can be enforced C against the company; and thirdly, that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively.

Clearly, therefore, the plaintiffs (at least the second plaintiff) are entitled to the prayers that they are seeking in this action.

D The grounds of objection put forth by the defendant are without merits and irrelevant to the issue of the application of splitting of the shares by a member of the defendant, ie the nominee company. The contention of the defendant of the danger of the shares of the defendant falling into the hands of a third party, that is, Malpac Sdn Bhd is equally irrelevant to the issue of splitting of the Share Certificate No 270. The issue in respect of the third E party relates to Share Certificate No 272.

In the circumstances, I allowed the application of the plaintiffs but made no order as to costs as I was of the view that the preliminary issue raised by the defendant was a valid one that prompted the plaintiff to apply orally for the nominee company to be added as a plaintiff and which F application was allowed by me.

Application allowed.

Reported by Mohd Rizal Abidin

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